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PETITIONER'S REPLY BRIEF TO DIAMOND ALKALI CO., RESPONDENT.

Sexauer has filed a brief in this case opposing the Petition for Certiorari. It appearing that Diamond Alkali was not going to file a brief, petitioner filed a reply brief to Sexauer and pointed out the basic palpable errors in its reasoning and contentions. Thereafter Diamond Alkali did file a brief in opposition to the Petition for Certiorari as to it. It too reveals the same basic errors that prevail in the Sexauer reply and highlights the fundamental weakness of the majority opinion below. Diamond's reply cites no Pennsylvania cases to support it and obviously relies on New York law which is of course under our view inapplicable. It thus crashes head-on into the controlling rule expressed in *Erie v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938).

In its brief Diamond Alkali of necessity has been relegated to utter reliance upon the majority opinion of the Court of Appeals below. At pages 4-5 of that brief this is clearly demonstrated. It quotes from that opinion as follows:

> *"However, as in the case of the Sexauer label, since the cause of the accident is unknown, what could Diamond have suggested be added to the label even assuming such a policing power?"*

We have already pointed out in our Petition for a Writ of Certiorari that the plaintiff did prove the cause of the accident (pp. 26-27). As there indicated, Dr. Willard emphatically stated the cause. Judge Friendly in his opinion believed that plaintiff had proved the cause. Indeed, he stated that even without Dr. Willard's testimony (Appendix 19a, 20a) the jury had an adequate factual basis from which to find negligence. Judge Friendly added (20, 21a):

> "However, the proof went considerably beyond this. Dr. Mary Willard, Professor Emeritus of Chemistry at Pennsylvania State University, *testified that in her*

> *opinion the accident was caused by the production of hydrogen from the combination of zinc with the heated solution of sodium hydroxide.* She thought that the production of hydrogen above the stoppage forced the stoppage down through the pipe past the clean-out hole and that this pressure expelled the plug and the caustic solution through the hole. Another theory, consistent with a statement by Stief in applying for workmen's compensation benefits although in conflict with his trial testimony, is that there were two stoppages, one of ice above the plug and another of grease and debris below; that the melting of the ice by the torch caused some of the Mule Kick solution to fall through the pipe past the clean-out hole where it was stopped by the second blockage; and that the reaction of the Mule Kick with zinc in the pipe at the high temperature created by the torch produced hydrogen, which expelled the plug and caused the mixture to spurt through the hole." . . .
>
> " 'If twelve practical people can be persuaded that Stief's theory of the accident was more plausible than Sexauer's, I fail to understand how a judge could say they had gone beyond the bounds of reason." . . .
>
> " 'Depriving Stief of jury determination of the common sense questions on which his case against Sexauer depends runs wholly counter to the trend of Supreme Court decisions over the past decades.' ".

As the dissenting opinion makes clear the plaintiff has provided a factual explanation of how the accident happened and that those facts showed Diamond to be negligent. In that state of the record it was strictly the jury's province to decide how the accident happened and whether it constituted negligence, and the Court had no power to usurp that function. *Lavender v. Kurn,* 327 U. S. 645 (1946); *Smith v. Bell Tel. Co.,* 397 Pa. 134, 153 A. 2d 477 (1959).

Recognizing that this Court will in all probability vigorously enforce the landmark rule established by *Erie*

v. Tompkins, supra, Diamond Alkali also argues as an extra string to its bow that the evidence in the case reveals a lacuna of proof that it was aware of what Sexauer's label did or did not say and that this, therefore, somehow insulates it from liability. We think that this is an irrelevant consideration under Pennsylvania law. We do not agree that Diamond did not know what was in the label. The record is crystal clear that Diamond was fully aware of the inadequacies and misrepresentations of Sexauer's label.

Despite the hedging statement by one hostile witness that Diamond Alkali only began to sell caustic soda to Sexauer around 1961, the fact is that when pressed for a specific answer, Diamond flatly admitted in discovery procedures that it had had in its possession cans of Mule Kick as early as 1958 and, therefore, of course had the opportunity to and did see the labels on the cans prior to the date of the accident in this case. The following interrogatories were asked and answered by the defendant Diamond Alkali at 598a:

> "15. During the years 1959 and 1960, did you have the occasion to see any can or cans of Mule Kick Waste Pipe Cleaner?
>
> A. One—early 1959 or in 1958.
>
> 16. If so, state the time and place where these cans were seen and the circumstances under which they were seen.
>
> A. Received one can along with a complaint, asking if we could furnish a smaller sized material, so can could contain proper weight."

It is shocking that the defendant, Diamond, would contend that it had no knowledge of the contents of Sexauer's label for Mr. Sexauer testified as follows (680a):

> "Q. Do you know whether the information in that label has been checked during the period that you have been with the company?

A. Yes.
Q. Who checked it?
A. A chemist.
Q. Who?
A. Foster Snell.
Q. When?
A. I can't give you the date on that. And then the chemists that we buy the material from tested it.
Q. You mean Diamond Alkali?

MR. CARROLL: Now, unless he knows I move to strike the answer out.

MR. LORD: He said he knew.

Q. *Do you know that these people have checked it?*
A. *Yes, sir.*
Q. *And Diamond Alkali are one of those people?*
A. *In recent years, yes."*

Moreover, there is an admission by Mr. Carroll, counsel for Diamond that the label has been the same that has been used for thirty years, so that it must have been on the cans in 1958 when admittedly it was seen by the Diamond people (678a).

Even if Diamond had not seen the label, this would under Pennsylvania law, be no defense. It was its duty to see the label and to make certain that those to whom it had forwarded this dangerous material were labeling it properly so that adequate warning with necessary particularity would be given and be available to the ultimate consumer.

In our brief in chief, page 7, we cited *Roth v. Bankers Securities Corp.*, 242 F. 2d 509, 510 (C. A. 3, 1957) a Pennsylvania case: There Roth, a pedestrian leaned against a special type structural glass window which collapsed. Held: the owner should have realized that pedestrians might lean against the window and he was therefore under a duty to affirmatively ascertain the tensile strength of the glass in advance. He would thereby have realized it

was not fit for that purpose. The Court so held even though there was no proof of similar accidents having happened and despite the fact that the glass had been installed by an independent contractor. The court ruled that the owner was not insulated from liability by the fact that he had used an independent contractor to install the glass. It was his personal non-delegable duty to learn and know whether that kind of glass was fit for the use to which it was to be put on his property. So too, here Diamond is not protected by the fact that it passed on its caustic soda to Sexauer. Diamond was under a duty to find out for itself exactly how Sexauer was labeling the material after it received possession of it and to make certain that such labels gave the adequate warnings.

As we have said repeatedly, and here reiterate at the possible expense of boredom, we are dealing with Pennsylvania law. Pennsylvania imposes the above described affirmative, stringent non-delegable responsibility upon Diamond under the facts of this case. That New York law may hold to the contrary is utterly irrelevant. This Court has said and mandated that the Courts below were compelled to follow Pennsylvania law in cases such as this. This the Federal Courts in New York did not do. That is why this case comes to this Court to correct a clear violation of constitutional requirements. Those are the issues which must be decided and the errors can be corrected only in this Court. We respectfully submit that is why certiorari should be granted.

Respectfully submitted,

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